

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

HEALTHSOUTH d/b/a PHYSICIANS SURGERY CENTER¹

Employer

and

Case 20-RC-17542-1

FREIGHT CHECKERS, CLERICAL EMPLOYEES &
HELPERS LOCAL 856, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

¹ The parties stipulated that the name of the Employer is Physicians Surgery Center (herein called the Center). The record reflects that Health South is one of two co-general partners which each own 20 percent of the Physicians Surgery Center. Health South also has the managing contract for Physicians Surgery Center. Sixty-five percent of the ownership of the Center is held by approximately 45 people, mainly physicians, who hold their ownership interest as limited partners. The record does not disclose who owns the other 15% of the Center. Health South also operates other facilities in Northern California, including facilities at San Carlos and Foster City, California. The administrator of the Employer testified that she is employed by Health South and the evaluation forms for employees bear the name Health South. Accordingly, I find that the correct name of the Employer is Health South d/b/a Physicians Surgery Center.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

2. The parties stipulated, and I find, that the Employer is a California limited partnership with a place of business in Daly City, California engaged in business as a health care institution providing health care services. The parties further stipulated, and I find, that during the past 12 months, ending June 30, 1999, in the course and conduct of its business, the Employer received gross revenues valued in excess of \$250,000, and during the same period, purchased and received goods and services valued in excess of \$5,000 which originated outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no contract bar to this proceeding.

² The Employer objected to the hearing officer's decision to allow the Petitioner to place into evidence as Petitioner's Exhibits 1 and 2 copies of the *Excelsior* lists from a prior election in Case 20-RC-17445. I take administrative notice of the fact that Case 20-RC-17445 involved a petition filed by the same Petitioner on August 4, 1998, to represent the same unit of employees of the Employer. Pursuant to a stipulated election agreement, a *Sonotone* election was to be conducted on September 18, 1998, among the same units of professional and non-professional employees as are petitioned for in the instant case. The *Excelsior* lists in question reflect that the individuals that the Employer alleges to be statutory supervisors in the instant case, Mamie Wong and Sue Johnson-Kennedy, were included in the unit of professional employees stipulated to by the parties in that case. On September 22, 1999, the undersigned approved the Petitioner's request for withdrawal of that petition with prejudice to the Petitioner's right to refile a petition involving the same unit of employees for a period of six months. No election was ever held in that case. I find no prejudicial error in the hearing officer's decision to allow the introduction of these *Excelsior* lists as I am in no way relying on those lists with regard to the determination made herein.

5. The Petitioner seeks to represent the following unit of employees whom the parties have stipulated is an appropriate unit for purposes of collective bargaining:

All full-time and regular part-time employees, including per diem employees who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut-off date, employed by the Employer at its Daly City, California, location; excluding guards and supervisors as defined by the Act.

Stipulations. The parties stipulated that the registered nurses (herein called RNs) employed by the Employer are professional employees within the meaning of the Act who should be accorded a Sonotone³ election.

The parties further stipulated, and I find, that John Churnin, M.D., the Medical Director of the Center, should be excluded from the unit, and that Sharon Payne, the Regional Office Operations Manager, should also be excluded from the unit as a supervisor under the Act based on her authority to assign work, approve overtime, evaluate employee performance and effectively recommend the hiring of employees. Payne supervises 2 schedulers who schedule surgeries, 1 receptionist and 2 patient account representatives.

The parties further stipulated, and I find, that Registered Nurse Erin Churnin is the divorced former spouse of Medical Director Churnin, who is a limited partner of the Employer. Neither party took a position at the hearing regarding whether Erin Churnin should be included or excluded from the unit.⁴

³ See Sonotone Corporation, 90 NLRB 1236 (1950).

⁴ No evidence was introduced regarding Erin Churnin at the hearing other than the above stipulation. As there is no evidence to show that she receives any special treatment as a result of being the ex-wife of the Center's physician director, I find that she is included in the unit. See Mega Van & Storage, Inc., 294 NLRB 975, 978 (1989).

Issue Presented. The only issue presented herein is whether two RNs, Sue Johnson-Kennedy and Mamie Wong, are statutory supervisors who should be excluded from the unit. The only witnesses at the hearing were Administrator Allison Isaacs and RN Sue Johnson-Kennedy.

Background. The Employer operates an outpatient/ambulatory surgery center in Daly City, California, where surgical and endoscopy (gastrointestinal) (herein called GI) procedures are performed.⁵ The Center opened in approximately October 1990. It is open Monday through Friday, 7 a.m. to 5 p.m. The Center is housed in a free-standing building comprised of three operating rooms, a recovery room or Post Anesthesia Care Unit (PACU), a GI area; a waiting area; a reception area; a lounge; and administrative offices.

As indicated above, the Center's physician medical director is Dr. John Churnin. The Employer's administrator is Allison Isaacs, a licensed physical therapist, who began working at the Center in February 1999.⁶ Prior to Isaacs, the administrator of the Center was an RN, Kathy O'Riordan, who left the Employer in August 1998. The Employer had no administrator between August 1998 and February 1999 when Isaacs took over the position. At the time of the hearing, there was no director of nursing employed at the Center. The former Director of Nursing, Rick Taylor, left the Center in August 1998. Isaacs testified that although she has been seeking to fill the director of nursing position since she began work at the Center in February 1999, she has found no qualified applicant to fill the position.

⁵ The Employer has the capacity to have up to 2 patients spend the night (up to 23 hours) on an as needed basis if they need to be monitored for an extended time or for pain control, etc.

⁶ Isaacs has previously worked as an administrator at two other Health South centers.

Isaacs testified that she is assisted in her supervision of the Center by Regional Office Operations Manager Sharon Payne, whom the parties have stipulated is a statutory supervisor, and by RNs Sue Johnson-Kennedy and Mamie Wong. Payne, Johnson-Kennedy and Wong report directly to Isaacs.

According to Isaacs, soon after she became administrator in February 1999, she informed Wong and Johnson-Kennedy that they had both been promoted to charge nurses and would receive an increase in pay. The record contains two personnel action forms prepared on February 5, 1999, showing that Johnson-Kennedy and Wong were changed from RN to RN-Charge Nurse status and were given 5% pay increases from \$30.01 to \$31.51 per hour. Isaacs testified that when she informed Wong and Johnson-Kennedy of the promotion, she did not specifically discuss with them what their duties as charge nurses would be.

Johnson-Kennedy testified that she had never been informed by Isaacs that she was a charge nurse; had never seen the personnel action forms described above; and had never been instructed by Isaacs as to her duties as a charge nurse. She testified that her understanding was that the wage increase given to her in February 1999 was as a result of a market survey adjustment that all employees had received. In this regard, Isaacs testified that at the same time Johnson-Kennedy and Wong received their promotional increase, approximately 10 other employees received pay increases based on market surveys undertaken with respect to some but not all positions at the Center. Isaacs could not recall the percentage amounts of the adjustments received by these other 10 employees. According to Isaacs, such adjustments were done by Health South Regional Manager Peggy Wellman, who also signed the personnel action forms for Wong's and Johnson-Kennedy's promotions.

According to Johnson-Kennedy, the only meeting she attended with Wong and Isaacs about the respective duties of Johnson-Kennedy and Wong, took place about a month prior to the hearing in this case. At that meeting, Wong complained about receiving calls from the Center after hours and on weekends regarding problems that had arisen, stating that she was not being paid to handle such calls. According to Johnson-Kennedy, Isaacs agreed that Wong and Johnson-Kennedy would not handle such calls.

Isaacs testified that RNs Johnson-Kennedy and Wong both possess the same level of authority in their respective areas to handle the staffing and scheduling of employees; to effectively recommend hiring; to evaluate other employees; to assign work; to decide whether employees can clock out early; to verify time sheets; and to be responsible for employee break and lunch times.

RN Johnson-Kennedy works in the recovery and GI area where seven RNs, two licensed vocational nurses (LVNs) and two certified nursing assistants (CNAs) are employed. RN Wong works in the operating rooms and central supply where three RNs, three operating room technicians and three central supply technicians are employed.

Johnson-Kennedy testified that she began working for the Center prior to its opening in 1990 and that she became a charge nurse in approximately 1996. According to Johnson-Kennedy, RN Wong was the director of nurses for the Center until mid-1997 and was also performing the duties of a charge nurse. Johnson testified that in January 1998, when Rick Taylor became the Center's director of nursing, both Johnson-Kennedy and Wong were asked to give up their charge nurse positions and they did so.⁷ As indicated above, both prior

⁷ Johnson-Kennedy testified that she was paid an additional \$1 an hour for her charge nurse duties and that this extra pay was not taken away when she was asked to give up that position.

administrator O’Riordan and Director of Nurses Taylor left their positions with the Center in August 1998, and both positions remained vacant until Isaacs was hired as the new administrator in February 1999. According to Johnson-Kennedy, during this period when the Center was without an administrator or a director of nurses, in September or October 1998, Peggy Wellman, the regional director for Health South, asked Johnson-Kennedy and Wong to handle the staffing for their respective areas until the Employer found a new director of nursing.⁸ According to Johnson-Kennedy, pursuant to Wellman’s request, she and Wong have been handling the staffing for their respective areas since October 1998. The record discloses no evidence regarding how other managerial/supervisory duties were handled during the period from August 1998 to February 1999 when Isaacs became the administrator.

With regard to staffing duties, Johnson-Kennedy testified that her duties in this regard include deciding on a daily basis how many nurses will be needed for recovery and for GI and making up a daily tentative schedule based on scheduled surgeries and the numbers and types of procedures to be performed. As indicated above, this involves scheduling 7 RNs, 2 LVNs and 2 CNAs. As discussed below, one of the RNs and one of the CNAs are exclusively assigned to patients who stay overnight. In GI, there are two full-time nurses, an RN and an LVN. In recovery, there are 3 full-time RNs. All of the full-timers work a Monday through Friday schedule although the hours for all of them (except Johnson-Kennedy who opens the Center each day) vary on a daily basis depending on what surgeries and procedures are scheduled. There is one part-time employee, nurse Marian Kitagawa, but Kitagawa also works 40 hours a week.

There are also two per diem employees, one of whom works only in the evenings because she has a morning job and the other of whom works about 4 days a week. The per diem employees are not required to accept assignments. As discussed below, there has only been one occasion in the past 4 to 5 years where a registry has been used, and in that instance, Johnson-Kennedy approached Isaacs who recommended that she call a particular registry used by another Health South Center.

According to Johnson-Kennedy, she has been working with most of the nursing staff for years, and she knows their scheduling needs and preferences and accommodates them. She testified that if there is late work to be assigned, she asks for volunteers to work the later hours. She spends about 30 minutes a day making up a schedule which is posted. She also calls other nurses at home who are not at the Center to let them know their hours for the next day. She testified that if she is busy in the operating room, another nurse will call employees at home to let them know their hours for the next day.

Johnson-Kennedy testified that on a daily basis, if there is a low census due to such factors as surgeries being cancelled, the Employer's established practice is to lay off employees who are not needed for staffing purposes for the day. Employees are not paid when they are sent home for lack of work. They are guaranteed four hours of pay if they have shown up for work. The Employer's long-time practice is to ask for volunteers who want to take the day off and if that does not resolve the issue then a first in-first out principle is applied whereby the first employee to come to work is the first employee to be sent home. Johnson-Kennedy generally

⁸ Johnson-Kennedy testified that prior to that time, Director of Nursing Taylor had handled staffing for

implements this practice by asking for volunteers or applying the first in-first out rule but sometimes Isaacs or other RNs in recovery or GI will do so. According to Johnson-Kennedy, usually there is no lack of volunteers to take the remainder of the day off. In those instances where asking for volunteers does not take care of the problem and the first-in first out principle is applied, Johnson-Kennedy is usually the first employee to go home because she opens the Center in the morning. She testified that other employees are well aware of this practice and that if she is busy with a GI procedure, she will sometimes return to the recovery room to learn that employees have left for the day due to surgical cancellations.

Johnson-Kennedy testified that she has three per diem employees that she can call in when there is more work than the regular employees can handle. Per diem nurses can refuse work. She further testified that she had recently used a registry to obtain extra nurses for the first time in four or five years. According to Johnson-Kennedy, on this occasion she had gone to Administrator Isaacs and informed Isaacs that “we’re going out of control, that the census is climbing and . . . we can’t adequately meet it, we don’t have enough staff.” According to Johnson-Kennedy, Isaacs recommended that she call the registry that the Health South San Francisco Center had contracted with for a low price. Johnson-Kennedy called this registry and the Employer obtained two RNs who alternate with each other in working for the Center.

With regard to hiring, Isaacs testified that she does not screen applications for staff positions but rather turns over all such applications to Johnson-Kennedy and Wong who review them. According to Isaacs, Wong has rejected all of the applications that Isaacs has referred to her as lacking the requisite qualifications and so has never recommended anyone who was hired

the Center.

by the Employer. Isaacs testified that Johnson-Kennedy has on three occasions during Isaacs' tenure as administrator, arranged to interview applicants on her own; interviewed them; and had them fill out applications and set them up for drug screens and given such information to Isaacs so that Isaacs can meet them and make them an offer. In this regard, Isaacs testified that she has never actually seen Johnson-Kennedy interview applicants but that Johnson-Kennedy sends them for drug screening prior to introducing them to Isaacs and that applicants are only sent for drug screening if they are going to be hired by the Employer. Isaacs testified that she relies on Johnson-Kennedy's recommendations as to hiring because Isaacs does not have the expertise to judge the qualifications and abilities of applicants. According to Isaacs, on all three occasions where Johnson-Kennedy has recommended that applicants be hired, Isaacs has met with them and they have been hired.

Johnson-Kennedy testified that she receives resumes from job applicants for her areas from Isaacs. She testified that she never reviewed resumes prior to Isaacs becoming the Employer's administrator. According to Johnson-Kennedy, she checks through the resumes to make sure that the applicant meets the basic requirements of the Employer, such as whether they have an Advanced Cardiac Life Support certificate, and she discusses the resume with other staff members. Then she either talks to Isaacs about meeting with the employee or informs her that the person does not have the skills needed. Johnson-Kennedy testified that it is Isaacs who makes the decision to contact and contacts the applicants for an interview, with the exception of one applicant Mary Patricia, an LVN. With regard to Mary Patricia, Johnson-Kennedy testified that she was recommended for hire by another nurse while Isaacs was on vacation so Johnson-Kennedy asked her to come in and visit the Center if she was interested in a position. Mary

Patricia came in and met with all of the recovery room staff but did not have a one-on-one interview with Johnson-Kennedy. Johnson-Kennedy asked her to fill out an employment application and to leave other pertinent information (i.e., driver's license, social security number, etc.) for Isaacs to review when she returned from vacation. After Isaacs returned, Johnson-Kennedy told Isaacs that Mary Patricia "looked like somebody we could train." According to Johnson-Kennedy, Isaacs told her that she would interview Mary Patricia and did so. Mary Patricia was apparently hired a few days prior to the hearing in the instant case.

With regard to other new hires in the per diem or part-time pool, Johnson-Kennedy testified that it was Isaacs who contacted those individuals to come to the Center. She testified that with regard to one such hire, a nurses' aide on the night shift, Isaacs informed her that there was a night shift nurse at the Health South San Francisco Divisadero Street Center that needed more work and was less expensive than the night nurse that the Center was using at the time. After that conversation with Isaacs, Johnson-Kennedy put this nurse on the schedule. She did not interview this nurse prior to putting her on the schedule. That nurse works at both the Center and the Divisadero Street Center. Isaacs testified that she recalled having a discussion about this nursing assistant, Melinda Salinas, and suggesting to Johnson-Kennedy that if she was having difficulty covering the night shift, she "might want to call that person as I understood this person had some extra time and could come over and work for us. And [she] was much less expensive than a registered nurse." According to Isaacs, Johnson-Kennedy had called the person in, and she had been working for the Center for a couple of months. Isaacs testified that the paperwork has been put in to transfer this nursing assistant to the Center.

Johnson-Kennedy testified that there have been three other hires that Isaacs contacted. According to Johnson-Kennedy, Isaacs told her that these applicants would be coming in. When they did so, Johnson-Kennedy took them around to show them the facility and introduce them to other staff members but did not interview them.

Isaacs testified that Johnson-Kennedy and Wong orient newly hired employees into their respective areas. Johnson-Kennedy testified that the nurses rotate the job of serving as a “buddy” to new hires in order to orient them to the facility. According to Johnson-Kennedy, the orientation involves showing the new employee where supplies are kept; how to do paperwork and charting; and familiarizing them with the equipment. Johnson-Kennedy testified that she has helped the GI nurse to train certain new employees because she has the skills to do so.

With regard to evaluating employees, Isaacs testified generally that the Employer does performance appraisals in approximately July and December and that they affect whether employees receive pay raises and merit increases.. She testified that she requested Johnson-Kennedy and Wong to do the appraisals on employees in their respective areas for July 1999,⁹ and that she gave them such forms and asked them to fill them out. She further testified that in June 1999, she also issued a memo asking employees to evaluate themselves but testified that few employees have done so. The record contains a copy of this memo from Isaacs to the staff dated June 28, 1999.

⁹ According to Isaacs, she visits the recovery and GI areas several times a week for a total of about 5 to 20 minutes at a time and has the opportunity to observe employees at work but is not a nurse and does not have the expertise to evaluate the performance of the work being performed by nursing employees. She testified that she visited the operating rooms where Wong works less often because of the necessity of scrubbing up to do so.

According to Isaacs, both Johnson-Kennedy and Wong have filled out appraisals in response to her request but she is not satisfied with them because they lack sufficient detail and examples so they have not been given to employees. She testified that she will go back to Wong and Johnson-Kennedy and ask them for more specific examples in order to complete the process. There is no evidence in the record that any of the appraisal forms filled out by Johnson-Kennedy or Wong had, as of the date of the hearing, been used to determine pay increases or other personnel changes for any employee.

The record contains 14 documents titled "HealthSouth Performance Appraisal Form," filled out by Wong and Johnson-Kennedy on employees in their respective areas. Six of these evaluations are dated July 19 or 20, 1999, and were filled out by Johnson-Kennedy on RNs who work in recovery or GI. These six documents contain only the first 2 pages of what is a four-page document and do not contain Johnson-Kennedy's signature. Eight of these appraisals were filled out by Wong and contain all 4 pages of the appraisal form and are signed by Wong as the immediate supervisor.

The appraisal form has numerical ratings of from one to four regarding various areas such as accomplishment of goals; job knowledge; "pulling the wagon," which involves such factors as teamwork and cooperation and productivity, etc; "pristine factor," which involves paying attention to details such as personal appearance, work area, etc.; compliance with Employer standards; service satisfaction involving communication, initiative and attitude, etc; skill review; attendance; major strengths and areas for improvement. The third page of the appraisal asks for an overall performance rating of from one to four and a performance improvement action plan for the upcoming evaluation period. The last page is a signature page

for approvals. As indicated above, there are no third and fourth pages included in the evaluation documents filled out by Johnson-Kennedy. The evaluations filled out by Wong do contain pages three and four and contain a designation of an overall rating for each employee on page three and on page four, Wong has signed on the line for "immediate supervisor." The evaluation also contains lines for approvals by "Two-up approval," "Human resources" and "Other" as well as the employee's signature. The evaluations in the record all contain handwritten commentary about the employee by Wong or Johnson-Kennedy.

Johnson-Kennedy testified that prior to filling out these evaluations, she had never done any appraisals for the Employer except on herself. She testified that she had previously been evaluated by former directors of nursing Taylor and Elizabeth White. She testified that she was instructed to do the evaluations by a memo from Isaacs but that she had no discussion with Isaacs prior to filling them out and turning them in. She testified that after she saw the memo, she asked Isaacs for the forms but there was no discussion of what was expected of her with regard to the forms or their import.

According to Isaacs, she did not fill out the last two pages of the evaluation because she did not feel it was her job to rate employees in the manner indicated and she did not sign the evaluations because she is not the employees' immediate supervisor. She testified that after she turned them in, sometime after July 20, 1999, Isaacs requested that she include additional information in these evaluations. Specifically Johnson-Kennedy recalled that Isaacs requested a skills checklist type of information. According to Johnson-Kennedy, Isaacs did not tell her what the evaluations would be used for.

With regard to scheduling, Isaacs testified that Johnson-Kennedy and Wong make out the daily schedule for the other employees in their respective areas and that Isaacs handles vacation scheduling but confers with them to determine whether there is adequate staffing to grant vacation requests. She testified that there are no established policies to follow in making scheduling decisions and that Johnson-Kennedy and Wong must use their own judgement in making out the schedule. According to Isaacs, their scheduling authority includes calling in additional employees and registry employees if necessary; allowing employees to leave early; sending employees home if the census of patients is low. Isaacs testified that when Johnson-Kennedy and Wong are absent, RNs Diane Roth and Daisy Veluz perform this scheduling task for them.

With regard to granting time off, Johnson-Kennedy testified that prior to July 1999, her standard practice had been to grant time off to employees although she had never been told by anyone in management that she possessed such authority. However, she testified that in July, she granted one day of paid time off to an employee in the GI lab and was given a disciplinary write up by Isaacs for doing so and told by Isaacs that under no circumstances was she permitted to grant time off to employees. Johnson-Kennedy testified that within a few weeks prior to the hearing in this case, Isaacs had issued a memo stating that any employee's request for time off would be paid time off but that if the Employer asked an employee to take time off due to a low census, it could be unpaid time off.

Johnson-Kennedy further testified that she has never been informed by anyone in management that she has the authority to grant less than a day off to employees and has stopped

doing so since she was disciplined in July 1999 for the above incident. Isaacs did not testify regarding this write up and its effect on any authority Johnson-Kennedy possessed in this area.

With regard to timecards, as indicated above, Isaacs testified that all employees fill out timecards and that Wong and Johnson-Kennedy are responsible for initially and verifying timecards for employees and making corrections on them if the entries are wrong. Isaacs also signs employee timecards. She testified that she informed the staff at her first staff meeting that Wong and Johnson-Kennedy would be signing off on their timecards and that timecards should be turned into them. According to Isaacs, she never communicated any change in this procedure to Wong or Johnson-Kennedy or to other employees.

The record contains a number of copies of timesheets signed by Wong and Johnson-Kennedy in the line titled "Supervisors Signature" for employees in their respective work areas.

According to Johnson-Kennedy, she started signing timecards in 1998 and stopped doing so in April or May, 1999. She testified that in 1998, she was instructed by management to total the weekly and bi-weekly work times of employees but was never instructed that she had the authority to alter or change what employees had written on their time sheets. She testified that Isaacs gave her the same instruction and told her to turn the sheets into Isaacs. She testified that she stopped signing the timecards in April or May of 1999 on her own decision and not because anyone in management instructed her to stop doing so. She testified that she spends about 30 minutes every other week totaling the hours of employees for the timecards.

Isaacs testified that Wong and Johnson-Kennedy possess the authority to authorize overtime for their respective areas and to decide who will work such overtime. Johnson-Kennedy testified that she had never been told that she possessed the authority to authorize

overtime for employees. Specifically, she testified that the administrator prior to Isaacs, Kathy O’Riordan, had informed her that only the administrator or the medical director could approve overtime and she had not done so.

The record contains a timecard for RN Patti Laggoretti dated April 3, 1999, that is signed by Johnson-Kennedy containing a reference to Laggoretti being given .25 hours of overtime on April 2, 1999. According to Johnson-Kennedy, in this instance Dr. Churnin had told her to give Laggoretti the overtime.

With regard to Wong’s and Johnson-Kennedy’s responsibility to oversee employees’ taking breaks and lunch in their respective areas, Johnson-Kennedy testified that employees are not required to obtain approval to take lunch and breaks and that she has no authority over other employees in this area. Isaacs testified in this regard that she had recently informed Johnson-Kennedy that an employee who worked in her area was not taking lunch and that she had seen Johnson-Kennedy turn around and reprimand the nurse for not doing so. Johnson-Kennedy testified regarding the same incident that Isaacs had approached her in the lunch room and said that she had done the payroll and observed that quite of few people were working more than 6 hours and not taking their lunch breaks. According to Johnson-Kennedy, Isaacs told her to relay to the staff to take their lunch breaks. She then went and spoke to all of the nurses in the lunchroom and told them they must put down their lunch breaks.

With regard to the assignment of work, as indicated above, Isaacs testified that Wong and Johnson-Kennedy are authorized and do assign the work in their respective areas. Johnson-Kennedy testified that she has never been told that she had authority to assign work in her area and does not assign tasks to other nurses nor would she need to do so. She testified that most of

the nurses have been working in recovery and GI for years and know their jobs. She testified that there is no division of labor in the recovery room. All of the RNs and LVN do the same tasks except that the LVN is not legally permitted to run intravenous catheters (IV's) so an RN must do that task. With regard to GI, only certain nurses are skilled to perform certain procedures so only two of the RNs and one LVN can perform such work and one additional RN is currently being trained to handle it.

With regard to her daily work, Johnson-Kennedy testified that she works from 5:30 am to 2 p.m., and opens up the Center. She has keys and the code to the alarm system.¹⁰ The first patients arrive around 5:45 a.m. She admits patients for surgery and works in the recovery room and in GI throughout the day, admitting patients; prepping patients; and serving as the surgical nurse and post-op nurse in recovery and helping perform GI procedures. Specifically, she spends most of her work time in recovery; about twice a week she works in operating room for about three or four hours; and she works two full days a week in GI doing procedures. She has a name tag that identifies her only as Sue Johnson-RN. According to Johnson-Kennedy, during her work hours she generally works only with RNs and one LVN. At the time of the hearing, she was working full-time in the GI department covering for a GI nurse (Erin Churnin) who was on leave. As indicated above, she testified that there is no division of labor in the recovery room and only certain nurses, including Johnson-Kennedy, are trained to perform GI procedures.

Johnson-Kennedy testified that after she leaves work at 2 p.m., there are usually still surgeries scheduled until as 5 p.m. or 6 p.m. and sometimes as late as 8 p.m. She testified that

¹⁰ Johnson-Kennedy testified that other employees also have keys to the Center, including RN Diane Roth and a business office employee Renee. The record does not disclose whether other employees know the security alarm code.

other nurses are on duty during the later shift. The Center has beds for two patients to stay overnight for 23 hours if needed. Usually this is pre-scheduled for reasons of observation or pain control. The Employer has one RN and a CNA that exclusively handle the overnight patients. These two employees work a 12-hour shift from 6 p.m. till 6 a.m.

The record discloses no evidence of any involvement by Wong or Johnson-Kennedy in disciplining or terminating employees. Nor does the record contain any job descriptions for the position of charge nurse or other documentary material regarding the duties of the charge nurse position.

Analysis. Section 2(11) of the Act defines a supervisor as :

. . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is interpreted in the disjunctive and the possession of any one of the authorities listed places the employee invested with this authority in the supervisory class. See Providence Hospital, 320 NLRB 717 (1996) enf'd 121 F.3d 548 (9th Cir. 1997).

In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with “genuine management prerogative,; and “straw bosses, lead men, and set up men” who are protected by the Act even though they perform minor supervisory duties.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974). The Board applies the same test to charge nurses to determine whether they are statutory supervisors as it does to all other employees. See Northern Montana Health Care, 324 NLRB 752 (1997). Finally, it is well established that the

burden of proving supervisory status is on the party asserting it. Northern Montana Health Care Center, supra.

In the instant case, Administrator Isaacs has testified that Wong and Johnson-Kennedy possess the same level of supervisory authority in their respective areas. Accordingly, for purposes of this decision, determinations regarding the possession of authority or lack thereof by Johnson-Kennedy are also to be read as determinations with regard to RN Wong.

With regard to the issue of whether Wong and Johnson-Kennedy effectively recommend hiring, the testimony of Isaacs is that Wong has rejected all applications of employees that have been forwarded to her as lacking the requisite skills or qualifications, and Wong has never interviewed or recommended any employees for hire. The testimony of Isaacs and Johnson-Kennedy differ as to whether Johnson-Kennedy makes recommendations for hire that Isaacs relies upon in hiring new employees. Thus, Johnson-Kennedy testified that she has jointly with her co-workers reviewed resumes of nurses to see if they possess the requisite skills and qualifications and has reported her conclusions to Isaacs; has handled the administrative paperwork with regard to some applicants; and has shown some applicants around the Center, but has not made any recommendations for hire. Isaacs, on the other hand, testified that she relies on Johnson-Kennedy's recommendations in making hiring decisions. I find that even assuming that Isaacs does rely on Johnson-Kennedy's recommendation in making her hiring decisions, in doing so she is relying on Johnson-Kennedy's professional knowledge as a nurse as to what qualifications are required and whether an applicant's resume reflects the skills necessary to meet the needs of the Center. Thus, because there is no director of nursing at the Center, and Isaacs is not a nurse but a licensed physical therapist, she must rely on Johnson-

Kennedy's professional judgement as to the qualifications of prospective nursing employees.

The record reflects that it is Isaacs who makes the actual decision to hire. I do not find that this type of "recommendation" involves the exercise of supervisory authority. Similarly, the fact that Wong has rejected all of the resumes that Isaacs has asked her to screen because they did not reflect the necessary qualifications does not warrant the conclusion that Wong is a statutory supervisor.

Nor do I find that the evidence is sufficient that Wong and Johnson-Kennedy are supervisors because in June or July 1999, they were asked by Isaacs to complete employee appraisals which they did. Thus, the record shows that Wong and Johnson-Kennedy had never previously been asked to fill out appraisals by the Employer; that the appraisals they filled out in July 1999, had not been completed as of the time of the hearing in this case and had not been used by the Employer for any decision-making regarding promotions, pay raises or any other personnel actions; and that there is no evidence that Wong and Johnson-Kennedy were ever informed that the evaluations they filled out would be used by the Employer to determine pay increases or other personnel actions for employees.

The record does not establish that Wong or Johnson-Kennedy possess independent authority to grant time off. Thus, Johnson-Kennedy testified that she was recently disciplined by Isaacs for granting a day off to an employee and was directed that under no circumstances was she to grant time off to employees. Isaacs did not testify regarding this incident. Nor does the record establish that either Wong or Johnson-Kennedy has the authority to grant overtime.

Nor does the record establish that Wong and Johnson-Kennedy are supervisors based on their authority to initial or sign timecards, whether the task involved is verifying time worked or merely totally hours worked. See Providence Hospital, supra, at 731.

With regard to the authority of Wong and Johnson-Kennedy to schedule employees, I find that given the length of time they have performed this task (i.e., since September or October 1998) and the fact that there is no indication that the hiring of a new director of nurses is imminent, this task cannot be deemed of a temporary nature. Rather, it must be examined as a regular on-going part of the job duties of these two RNs. However, the evidence in the record is not sufficient to establish that this scheduling function involves the exercise of supervisory independent judgment as contemplated by Section 2(11) of the Act. Thus, in determining the number of employees who will work on a given day, Johnson-Kennedy's testimony reveals that she is considering the number and type of surgeries and GI procedures to be performed on a particular day. The hours of work assigned are likewise controlled by the times at which such surgeries and procedures are scheduled. The record reflects that Johnson-Kennedy works with a small number of nurses, seven RNs, two LVNs and two CNAs, and that among that limited number, five of these 11 employees are full-time and work five days a week, Monday through Friday. The only variation in the schedules of these full-time employees is their hours which fluctuate largely based on scheduled procedures over which Johnson-Kennedy has no control. There is one RN and one CNA who work exclusively with patients who stay overnight. Johnson-Kennedy must work the day shift because she opens the Center each morning. The other part-time/per diem employees are not required to accept work assignments. As indicated above, one of the per diem employees only works in the afternoon and evenings because she has

another job. The record shows that there is an established practice of laying off employees when the census drops either by a voluntary or a first-in first-out principle. There is no showing that Johnson-Kennedy can assign overtime or grant time off. With regard to the use of outside nurses, the record establishes that this occurred only rarely over the past four or five years and when it did, Johnson-Kennedy was told by Isaacs where to call to obtain registry nurses.

Under such circumstances, I find that the record evidence does not support that the daily scheduling by Johnson-Kennedy and by Wong requires the exercise of supervisory independent judgment.

Scheduling by charge nurses was discussed by the Board in Providence Hospital, supra, at 731-732, a case enforced by the Ninth Circuit. In Providence, the charge nurses were responsible for finding replacements if an RN was absent or a shift was understaffed, and they were authorized to check with other departments to see if an RN could be loaned from another department. After checking with shift coordinators to see if a replacement was available from elsewhere in the hospital, the charge nurse could also call an employee to work or could authorize overtime. Further, the charge nurses in that case determined at the beginning of each shift if they were over-staffed due to low census and could send employees home on a voluntary or rotational basis if they were not needed elsewhere in the hospital. The charge nurses in Providence also determined at the end of each shift the staffing needs for the next shift and could attempt to make adjustments by calling the shift coordinator or asking RNs to stay over. Charge nurses also typically approved or disapproved breaks by employees. Yet in Providence, supra at 731, the Board found that the evidence did not establish that the charge nurses' assignment of RNs was anything more than a "routine clerical task." In the instant case, I likewise find that the

facts herein do not support the conclusion that the staffing/scheduling function of Kennedy-Johnson and Wong involve the exercise of independent supervisory authority.

Further, I do not find that the secondary indicia of supervisory status supports a finding that Wong and Johnson-Kennedy are statutory supervisors. Thus, even assuming that they were promoted to charge nurses in February 1999, the acquisition of the title without actual proof of their possession of supervisory authority is not sufficient to render them statutory supervisors. Likewise, the fact that they receive a \$1 or so more in pay is consistent with their additional administrative duties such as opening up the Center, ordering supplies, etc., and does not alone establish supervisory authority. Nor is there any evidence that they receive any additional fringe benefits as a result of their title of charge nurse.

Accordingly, I find that RNs Kennedy-Johnson and Wong are not statutory supervisors and they are hereby included in the unit.

The Sonotone Election. As set forth above, the parties stipulated and I have found that the RNs are professional employees under the Act who should be accorded a Sonotone election.

Accordingly, I shall direct separate elections in the following voting groups:

VOTING GROUP A

All full-time and regular part-time registered nurses, including per diem registered nurses who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut off date, employed by the Employer at its Daly City, California location; excluding all other employees, guards and supervisors as defined in the Act.

VOTING GROUP B

All full-time and regular part-time non-professional employees, including licensed vocational nurses, certified nursing assistants, operating room technicians, central supply technicians, schedulers, receptionists, patient account representatives, including per diem

employees in these classifications who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut-off date, employed by the Employer in its Daly City, California location; excluding all registered nurses, guards and supervisors as defined in the Act.

The employees in the professional voting Group A will be asked two questions on their ballots:

1. Do you desire to be included in the same unit as other employees employed by the Employer at its Daly City, California location for the purpose of collective bargaining?
2. Do you desire to be represented for purposes of collective bargaining by Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO?

If a majority of the professional employees in Voting group A vote yes to the first question, indicating a desire to be included in a unit with the non-professional employees, they will be so included. Their vote on the second question will then be counted with the votes of the non-professional employees voting in Voting Group B to decide whether to select Petitioner as the representative for the entire combined unit. The Petitioner has stated on the record its willingness to represent the professional employees separately if those employees vote for separate representation. Thus, if the professional employees in Voting Group A do not vote for inclusion they will constitute a separate unit.

The ultimate determination will be based on the results of the elections. However, the following findings are made with regard to the appropriate units:

1. If the professional employees vote for inclusion in a unit with the non-professional employees, it is found that the following employees will constitute a unit

appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including per diem employees who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut-off date employed by the Employer at its Daly City, California, location; excluding guards and supervisors as defined in the Act.

2. If the professional employees vote against inclusion in the unit with the non-professional employees, it is found that the following units are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

VOTING GROUP A

All full-time and regular part-time registered nurses, including per diem registered nurses who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut off date, employed by the Employer at its Daly City, California location; excluding all other employees, guards and supervisors as defined in the Act..

VOTING GROUP B

All full-time and regular part-time non-professional employees, including licensed vocational nurses, certified nursing assistants, operating room technicians, central supply technicians, schedulers, receptionists, patient account representatives, including per diem employees in these classifications who have worked an average of 4 hours per week in the 13 weeks immediately preceding the eligibility cut-off date, employed by the Employer in its Daly City, California location; excluding all registered nurses, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

Elections by secret ballot shall be conducted by the undersigned among the employees in the voting groups set forth above at the time and place set forth in the notice of elections to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in

each voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are per diem employees who worked an average of four hours per week in the 13 weeks immediately preceding the eligibility cut off date. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by FREIGHT CHECKERS, CLERICAL EMPLOYEES & HELPERS LOCAL 856, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters,

shall be filed by the Employer with the Regional Director of Region 20 who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Region 20 Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before **August 18, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **August 25, 1999**.

DATED at San Francisco, California, the 11th day of August, 1999.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

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